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In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 14

REPUBLIC STEEL CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
and
STEEL WORKERS ORGANIZING COMMITTEE,
Respondents.

MOTION OF REPUBLIC STEEL CORPORATION FOR LEAVE TO FILE OUT OF TIME, AND PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

LUTHER DAY,
1759 Union Commerce Bldg., Cleveland, Ohio,
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Attorneys for Petitioner,
Republic Steel Corporation.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. 707.

REPUBLIC STEEL CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
and
STEEL WORKERS ORGANIZING COMMITTEE,
Respondents.

MOTION OF REPUBLIC STEEL CORPORATION FOR LEAVE TO FILE OUT OF TIME PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

Now comes Republic Steel Corporation, petitioner herein, and moves this Court for an order permitting it to file out of time a petition for rehearing of its petition for a writ of certiorari, a copy of which petition for rehearing is attached hereto and by reference made a part hereof, and in support of its motion represents that:

This Court entered an order on April 8, 1940, denying petitioner's petition for certiorari in this case. The time provided in Rule 33 of the Rules of this Court for filing a petition for rehearing expired on May 3, 1940. On May 6, 1940 there was published in Labor Relations Reporter the decision of the United States Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board v. Leviton Manufacturing Co. Inc.*, decided April 29, 1940, which decision is squarely in conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit in the case at bar on an important question of fed-

eral law, as appears in the attached petition for rehearing, thereby creating for the first time a direct conflict between the Circuits on such question of law. Prior to May 6, 1940, the decision of the Circuit Court of Appeals for the Second Circuit above referred to had not been published in any official or unofficial report to the best of the knowledge of petitioner's counsel and was unknown to petitioner and its counsel. This motion and the attached petition for rehearing have been prepared with due diligence since May 6, 1940.

WHEREFORE, petitioner prays that this Court enter an order permitting the filing instanter of the attached petition for rehearing.

REPUBLIC STEEL CORPORATION,

By LUTHER DAY,
1759 Union Commerce Bldg., Cleveland, Ohio,

THOMAS F. PATTON,
Republic Bldg., Cleveland, Ohio,

JOSEPH W. HENDERSON,
Packard Bldg., Philadelphia, Pa.,

MORTIMER S. GORDON,
80 Broad St., New York, N. Y.,

Attorneys for Petitioner,
Republic Steel Corporation.

CERTIFICATE.

We, Luther Day and Thomas F. Patton, of counsel for petitioner, do hereby certify that the facts stated in the foregoing Motion are true to the best of our knowledge.

LUTHER DAY,

THOMAS F. PATTON,

Attorneys for Republic Steel Corporation.

Dated: May 7, 1940.

In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. 707.

REPUBLIC STEEL CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
and
STEEL WORKERS ORGANIZING COMMITTEE,
Respondents.

PETITION FOR REHEARING OF PETITION FOR CERTIORARI.

Comes now the above named petitioner, Republic Steel Corporation, and presents this its petition for a rehearing of its Petition for Certiorari in the above entitled case and, in support thereof, respectfully shows:

Since denial of the petition for certiorari by this Court on April 8, 1940, a direct conflict of decisions on an important question of federal law involved in this case has arisen between the Circuit Court of Appeals for the Third Circuit (in this case) and the Circuit Court of Appeals for the Second Circuit in the case of *National Labor Relations Board v. Leviton Manufacturing Company, Inc.*, hereinafter discussed.

It was argued by petitioner in its brief in support of its petition for certiorari in the case at bar, Point IV, pages 44 to 47, that the court below had erroneously decided an important question of federal law when it sustained the

order of the National Labor Relations Board (hereinafter called the Board) requiring the petitioner to reimburse work relief projects for the wages paid by such projects to striking employees. The amount of such wages involved in this case is substantial.

When the foregoing brief was prepared, and at the time certiorari was denied by this Court, there was no decision of another Circuit Court of Appeals squarely in conflict with the decision of the court below, although doubt had been expressed about the matter in the case of *National Labor Relations Board v. National Casket Co., Inc.*, 107 Fed. 2d 992, 998, decided by the Circuit Court of Appeals for the Second Circuit. (Petition for certiorari, p. 47.)

That there was no conflict of decisions at that time was stated in the brief of the Board in opposition to granting certiorari, at page 24.

The Circuit Court of Appeals for the Second Circuit has now squarely held that the Board has no authority in law to require an employer to reimburse work relief projects for compensation paid to striking employees. This decision is *National Labor Relations Board v. Leviton Manufacturing Company, Inc.*, decided April 29, 1940 and reported for the first time in Volume 6, No. 10 of the Labor Relations Reporter (issued May 6, 1940) at page 351. For the convenience of the Court the opinion in that case as printed in the report above referred to is reprinted as an appendix to this petition.

The Court, consisting of Judges Learned Hand, Augustus Hand and Patterson, reversed that part of a Board order

> "* * * which directed the company, after deducting from Levine's back pay any money received 'for work performed upon Federal, State, county, municipal, or other work-relief projects,' to 'pay over the amount, so deducted, to the appropriate fiscal agency of the

* * * governments which supplied the fund for said work-relief projects.' "

The court said:

"The Third Circuit has twice passed upon the second point in the Board's favor, though without more discussion than to say that they thought it within the power of 'affirmative action' to 'effectuate the policies' of the act which Section 10(c) confers (1 L. R. R. Man. 807). *Republic Steel Corp. v. N.L.R.B.*, 107 F. (2d) 472, 478 (5 L. R. R. 266); *Union Drawn Steel Co. v. N.L.R.B.*, 109 F. (2d) 587, 594 (5 L. R. R. 634). We cannot see that the point was ruled in *N.L.R.B. v. Planters Manufacturing Co.*, 105 F. (2d) 750, 753 (4 L. R. R. Man. 616, 618) (C. C. A. 4). The 'affirmative action' which the section contemplates must be remedial, and not punitive or disciplinary (*Consolidated Edison Co. v. N.L.R.B.*, 305 U. S. 197, 236 (3 L. R. R. Man. 645, 655); *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 257 (4 L. R. R. Man. 515, 520); *N.L.R.B. v. Newport News Shipbuilding Co.*, 308 U. S. 241, 250 (5 L. R. R. 404)), and the order, qua payments, must therefore be confined to restitution for the wrong done, however widely that should be conceived.

* * *

"However, the whole administration of 'work-relief' was conceived in a spirit exactly the opposite of charity; the very purpose of it was that the employees should understand themselves not to be the objects of charity, but to be performing work of a value equal to what they received. As the case stands, therefore, there is no more reason why the company should be compelled under the guise of restitution, to subvene the public enterprises on which Levine worked, than if these had been the ventures of a private capitalist. We must assume that he gave as much as he got, and the order *pro tanto* transferred the burden of the public improvement from the public, which presumably is to profit by it, to the company which will do so only as a member of the public. There could be no clearer instance of a punitive measure than that. There should therefore be deleted from Article

> II (e) of the order all that part beginning with the words, 'deducting, however, from the amount,' etc."

On the contrary, the Third Circuit Court of Appeals, in affirming the Board's standard order in this respect in the case at bar, said

> "One phase of this part of the order requires special mention. The order provides that any sums which these employees may have received in the interim for work performed upon federal, state, county, municipal or other work relief projects shall be deducted from the amounts ordered to be paid to them by Republic and shall be paid over to the appropriate governmental agencies which supplied the funds for the work relief projects. Republic urges that this provision is beyond the Board's jurisdiction. We think, however, that it is within the discretionary power of the Board and that it is not unreasonable. A similar order was enforced in *National Labor Relations Board v. Planters Mfg. Co.*, 4 Cir., 105 F. 2d 750." (p. 378)

The decision of the Third Circuit Court of Appeals in this case is, therefore, squarely in conflict with that of the Second Circuit Court of Appeals in the *Leviton Manufacturing Company* case, *supra,* on this important question.

The decision in the *Leviton Manufacturing Company* case gives an aspect to the question very different from that prevailing when certiorari was denied. Then the uniform practice of the Board, in the absence of authority to the contrary in the courts, constituted some foundation for the decision of the Circuit Court of Appeals in this case which must now be considered undermined by a squarely contrary well-considered holding of a court of such authority and distinction as the Circuit Court of Appeals for the Second Circuit.

For the foregoing reasons, as well as others urged in the petition for certiorari, it is respectfully urged that this petition for rehearing be granted and that upon further

consideration, the petition for certiorari in this case be granted.

Respectfully submitted,

REPUBLIC STEEL CORPORATION,

By LUTHER DAY,
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THOMAS F. PATTON,
Republic Bldg., Cleveland, Ohio,

JOSEPH W. HENDERSON,
Packard Bldg., Philadelphia, Penna.,

MORTIMER S. GORDON,
80 Broad Street, New York City.

Certificate of Counsel.

We, Luther Day and Thomas F. Patton, of counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

LUTHER DAY,
THOMAS F. PATTON,
Attorneys for Republic Steel Corporation.

Dated: May 7, 1940.

APPENDIX.

(Opinion in National Labor Relations Board v. Leviton Manufacturing Company, Inc. as reported in Vol. 6, No. 10, Labor Relations Reporter at pages 351 and 352.)

U. S. CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT.

NATIONAL LABOR RELATIONS BOARD v. LEVITON MANUFACTURING CO., INC., No. 297, APR. 29, 1940.

On motion of the National Labor Relations Board to enforce an order made by it against the respondent (4 L. R. R. Man. 83, 11 N. L. R. B., 1248) under Section 10(e) of the National Labor Relations Act. Order modified, and as modified, enforced.

Before L. HAND, AUGUSTUS N. HAND and PATTERSON, *Circuit Judges.*

L. HAND, *C. J.*:—This cause comes before us upon a motion of the National Labor Relations Board for an order of this court, enforcing its own order against the respondent company [4 L. R. R. Man. 83, 11 N. L. R. B. 1248]. Only two questions arise: whether there was any substantial evidence to support the finding that one, Levine, an employee of the company, was discharged because of his union activities; and whether, if so, that part of the order was valid which directed the company, after deducting from Levine's back pay any money received "for work performed upon Federal, State, county, municipal, or other work-relief projects," to "pay over the amount, so deducted, to the appropriate fiscal agency of the * * * governments which supplied the fund for said work-relief projects."

The evidence was in conflict as to whether Levine had quit the company of his own accord, or whether he had been discharged; one member of the Board dissented, believing that no case had been made out. The evidence in

support of the complaint was that Levine began to work for the company in April, 1934, and had worked steadily until the spring of 1937, except for an eight weeks illness. In March of that year he joined a C. I. O. union and persuaded two other employees to do so (the union was just beginning to try to organize the plant) and the three became active proselytizers.

The company's business was increasing, and on Friday, April 2, its superintendent announced that the "bakelite division" must work Sundays; Levine protested against this on behalf of the men in that day division, and on Monday, the 5th, one Kupferman, one of the company's salesmen, and a friend of Levine's, asked Levine to meet him at 5:30 P. M. outside the plant. Levine got leave to quit early from his assistant foreman—who said that he "knew about it"—and met Kupferman as arranged. Kupferman then asked Levine why he was "ringleader" and the "center of everything"; and told him that he, Kupferman, was in "hot water" with the company, presumably because of his intimacy with Levine. Kupferman then promised Levine a job elsewhere, and dictated a resignation in which Levine said that he was leaving of his "own accord" because he had prospects of better pay and work more to his liking. That same evening Kupferman called upon him at his home and told him to disregard their talk, and to go to work as usual, which he did on Tuesday and Wednesday. On that day Kupferman gave him his pay, and told him not to come back because he was "organizing the plant," and that the company's president would not "stand for any union." All this depended upon Levine's testimony, corroborated, as to Kupferman's interview at Levine's home, by Levine's wife.

The respondent's witnesses told the following story. The superintendent of the bakelite division, Swanson, said that Levine came in on Monday, April 5th, and told him he was going to quit because he was afraid that he was

getting sick again. Swanson told him that the company had recently begun to get written resignations from employees, and that he would "appreciate" one from Levine; Levine thereupon wrote out the resignation giving as the cause of his leaving the prospect of a better job. Later on that day Swanson told the plant superintendent, Leavenworth, that Levine was going to quit, and Leavenworth answered that this would be embarrassing, and went to Kupferman and asked him to persuade Levine to stay until another experienced bakelite molder could be obtained. Leavenworth and Kupferman corroborated this story. Kupferman did persuade him to stay, and on Wednesday, the 7th, Swanson thanked him for doing so and paid him his wages. Levine concededly filed a charge with the Board against the company on Friday, the 9th, on the ground of a discharge for union activity.

It is apparent from the foregoing that the case is one in which, despite the dissent of one member, the Board's finding is final; and that we must not say that it was bound to disbelieve Levine's testimony. True, it was possible that he might have concealed his real reason for leaving, because he did not want to make a written record of his illness; but it was extraordinary for him to quit just as he had begun to organize the shop for a militant union, giving illness as an excuse; and it was particularly perfidious for him to turn about in forty-eight hours and charge that he had been discharged for union activity. There is no suggestion that his illness was acute, or came upon him suddenly; indeed he was said to have spoken of it before he protested about the Sunday work. We are not even certain that in the Board's place we might not have voted with the majority; at any rate there was substantial evidence to support their finding.

The Third Circuit has twice passed upon the second point in the Board's favor, though without more discussion than to say that they thought it within the power of "af-

firmative action" to "effectuate the policies" of the act which Section 10(c) confers [1 L. R. R. Man. 807]. *Republic Steel Corp. v. N. L. R. B.*, 107 F. (2d) 472, 478 [5 L. R. R. 266]; *Union Drawn Steel Co. v. N. L. R. B.*, 109 F. (2d) 587, 594 [5 L. R. R. 634]. We cannot see that the point was ruled in *N. L. R. B. v. Planters Manufacturing Co.*, 105 F. (2d) 750, 753 [4 L. R. R. Man. 616, 618] (C. C. A. 4). The "affirmative action" which the section contemplates must be remedial, and not punitive or disciplinary (*Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 236 [3 L. R. R. Man. 645, 655]; *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 257 [4 L. R. R. Man. 515, 520]; *N. L. R. B. v. Newport News Shipbuilding Co.*, 308 U. S. 241, 250 [L. R. R. 404]), and the order, *qua* payments, must therefore be confined to restitution for the wrong done, however widely that should be conceived.

The Board itself has always deducted from the wages to be recovered what the employee may have earned meanwhile, and it is impossible to see how it could have done less, whatever may be proper as to what he could have earned by reasonable efforts, but did not. His receipts may be of three kinds: wages from a private employer; wages from a public agency; alms or a dole. As to the first, the Board has never suggested that the employer must pay to another private employer what that employer paid to the employee, and obviously, that would be absurd. Since the order speaks of "monies received * * * for work performed," we need not consider alms, or a dole. "Monies received * * * for work performed" may be no more than a fair return for services rendered, or they might have been deliberately made higher, the margin being dole; and the record at bar does not contain any evidence on the point. At most, any such provision would have to be confined to such a margin; we do not suggest that even then it would be valid.

However, the whole administration of "work-relief" was conceived in a spirit exactly the opposite of charity; the very purpose of it was that the employees should understand themselves not to be the objects of charity, but to be performing work of a value equal to what they received. As the case stands, therefore, there is no more reason why the company should be compelled under the guise of restitution, to subvene the public enterprises on which Levine worked, than if these had been the ventures of a private capitalist. We must assume that he gave as much as he got, and the order *pro tanto* transferred the burden of the public improvement from the public which presumably is to profit by it, to the company which will do so only as a member of the public. There could be no clearer instance of a punitive measure than that. There should therefore be deleted from Article II (e) of the order all that part beginning with the words, "deducting, however, from the amount," etc.

Order modified as above; motion for an enforcement order granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 14

REPUBLIC STEEL CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
and
STEEL WORKERS ORGANIZING COMMITTEE,
Respondents.

SUGGESTION IN SUPPORT OF PETITION FOR REHEARING OF PETITION FOR CERTIORARI.

Now comes Republic Steel Corporation, petitioner herein, and presents this, its suggestion in support of its petition for rehearing of its petition for certiorari in the above entitled case, and in support thereof, respectfully shows:

On May 8, 1940, this petitioner, Republic Steel Corporation, filed in this Honorable Court a motion for leave to file out of time a petition for rehearing of its petition for a writ of certiorari, and a petition for rehearing of its petition for certiorari, on the ground that the decision of the lower court in the case at bar is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *National Labor Relations Board v. Leviton Manufacturing Company, Inc.*, decided April 29, 1940. This conflict is with regard to the validity of that portion of the order of the National Labor Relations Board (hereinafter called the "Board"), which requires the petitioner herein to reimburse the fiscal agencies of work relief

projects for amounts paid by such projects as wages to striking employees. The Third Circuit Court of Appeals held in this case that this portion of the order was within the discretionary power of the Board and not unreasonable; the Second Circuit Court of Appeals held in the *Leviton Manufacturing Company* case that it was a punitive measure and beyond the power of the Board.

On May 13, 1940, there was published in the Labor Relations Reporter, Volume 6, No. 11, page 387, the decision of the Circuit Court of Appeals for the Ninth Circuit in *National Labor Relations Board v. Tovrea Packing Company,* decided April 30, 1940, which decision also is squarely in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case at bar on the same question. For the convenience of the Court the opinion in that case as printed in the report above referred to is reprinted as an appendix to this petition. Prior to May 13, 1940, the decision of the Circuit Court of Appeals for the Ninth Circuit above referred to had not been published in any official or unofficial report to the best of the knowledge of petitioner's counsel and was unknown to petitioner and its counsel. This suggestion in support of the petition for rehearing of the petition for certiorari herein has been prepared with due diligence since May 13, 1940.

The purpose of this suggestion in support of the petition for rehearing of the petition for certiorari herein is to bring to the attention of this Court the fact that the decision of the Circuit Court of Appeals for the Third Circuit in the case at bar is squarely in conflict, not only with the decision of the Circuit Court of Appeals for the Second Circuit in the *Leviton Manufacturing Company* case, *supra,* but also with the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Tovrea Packing Company* cas *supra,* on this important question involving the interpretation of the National Labor Relations Act for the purpose of determining the extent of the Board's jurisdiction to make

the type of order above referred to which, as pointed out in our petition for certiorari, page 47, has become a standard provision in "back pay" orders by the Board.

In the *Tovrea Packing Company* case the Ninth Circuit Court of Appeals (Judges Wilbur, Mathews and Stephens) said:

> "The order for reinstatement with back pay included the provision that there should be deducted from such pay 'his net earnings during said period; deducting, however, from the amount otherwise due to each of the said employees, monies received by said employee during said period for work performed upon Federal, State, county, municipal or other work-relief projects; and pay over the amount, so deducted, to the appropriate fiscal agency of' the governmental agency 'which supplied the funds for said work-relief projects.' The Board has in several cases made the requirement that the sum deducted on account of relief-work payments should be returned to the source of such payments by the company required to make the back pay. So far as we have been able to ascertain, no court has passed upon the legality of such an order after the point has been argued, with the possible exception of the Third Circuit Court of Appeals, in *Republic Steel Corp. v. National Labor Relations Board*, 107 Fed. (2d) 472, 478 (5 L. R. R. 266) (C. C. A. 3, 1939). In that case a like order was held to be within the discretionary power of the Board and not unreasonable. The Second Circuit in *National Labor Relations Board v. National Casket Co.*, 107 Fed. (2d) 992 (5 L. R. R. 437), called attention to the inclusion of this requirement in the Board's order, and remarked, 'The validity of this provision has not been argued and we express no opinion on the point.' Judge L. Hand filed a dissenting opinion as to other subjects but on the one under discussion specifically agreed with the court's expression as above quoted.
>
> "The Act provides for 'reinstatement of employees with or without back pay, as will effectuate the purpose of the Act.' For a proper understanding this

statement must be read and considered as a whole. To our minds the discretion conferred upon the Board is limited to the point of whether an order for back pay will do more toward effectuating the purposes of the Act than to omit it—or possibly than an order for payment of part thereof. Whether or not this provision is held to be punitive in nature, we see no warrant for doing other than it provides. Certainly it does not authorize the Board to go outside of the statute and prescribe its own coercive measures in aid of 'effectuating' the purposes of the Act. *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197 (3 L. R. R. Man. 645); *National Labor Relations Board v. Remington Rand,* 94 Fed. (2d) 862, 872 (1-A L. R. R. Man. 585, 594).

"We have discussed each objection to the enforcement of the Board's order without lengthy quotation and discussion of fact and without citation of numerous authorities. It seems to us that the time has come when the fundamentals underlying the Wagner Act need not be the subject of treatises in every opinion upon the petition of the National Labor Relations Board for enforcement of its orders.

"Let the order of the Board be enforced, excepting, however, that portion thereof in regard to payment to the Government agencies of amounts deducted from back awards by reason of monies received by the employees for work performed upon work-relief projects."

As pointed out in the petition for rehearing of the petition for certiorari in the case at bar (page 6), the Third Circuit Court of Appeals held that the Board's standard order in this respect herein was within the discretionary power of the Board and not unreasonable.

We respectfully submit that the additional conflict between the decision of the Third Circuit Court of Appeals herein and that of the Ninth Circuit Court of Appeals in the *Tovrea Packing Company* case emphasizes the importance of the setting at rest by this Court of this im-

portant question, as well as other questions presented in the petition for certiorari herein.

Respectfully submitted,

REPUBLIC STEEL CORPORATION,

LUTHER DAY,
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JOSEPH W. HENDERSON,
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MORTIMER S. GORDON,
80 Broad St.,
New York, N. Y.,

Attorneys for Petitioner,
Republic Steel Corporation.

CERTIFICATE.

I, THOMAS F. PATTON, of counsel for petitioner, do hereby certify that the facts stated in the foregoing suggestion in support of the petition for rehearing of the petition for certiorari are true to the best of my knowledge.

THOMAS F. PATTON,
Attorney for Petitioner,
Republic Steel Corporation.

Dated May 15, 1940.

APPENDIX.

(Opinion in National Labor Relations Board v. Tovrea Packing Company, as reported in Vol. 6, No. 11, Labor Relations Reporter, at pages 387 to 389.)

U. S. CIRCUIT COURT OF APPEALS,
NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD v. TOVREA PACKING COMPANY, No. 9254, APR. 30, 1940.

Upon petition for enforcement of an order of the National Labor Relations Board (4 L. R. R. Man. 227, 12 N. L. R. B. 1063). Order enforced in part, and denied enforcement in part.

Before WILBUR, MATHEWS and STEPHENS, Circuit Judges.

STEPHENS, Circuit Judge:—The National Labor Relations Board, acting under authority of the National Labor Relations Act [49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*] [1 L. R. R. Man. 803], herein referred to as the Act, is here petitioning for an order of enforcement of its order [Sec. 10(e) Act] against Tovrea Packing Company, an Arizona corporation, herein referred to as Respondent [4 L. R. R. Man. 227, 12 N. L. R. B. 1063]. The Tovrea Employees' Association appears as intervenor.

Following conventional procedure, the Board found the Respondent company guilty of unfair labor practices [Sec. 8(1) (2) (3) Act] and issued its order (Note No. 1) to cease and desist certain practices and to reinstate nine discharged workmen with back pay under facts which may be briefly stated as follows:

Note No. 1.—So much of the Board's order as is necessary to an understanding of this proceeding is here set out:

"* * * respondent, Tovrea Packing Company * * * shall:

"1. Cease and desist from:

(a) Discouraging membership in Amalgamated Meat Cutters and Butcher Workmen of North America or any other labor organization of its employees, by discriminating against its employees in

Respondent is engaged in the general meat packing business. It purchases, feeds, slaughters, processes and markets livestock. A large percentage of such stock and essential materials used in the business are shipped in interstate commerce. Respondent operates and maintains feeding pens, retaining pens, and a feed mill adjacent to its packing plant. The cattle at the feeding pens are fed chopped hay, higera ensilage, cotton seed meal, cotton seed hulls, barley, and molasses in varying quantities. This feed is mixed by hand and distributed by men employed as cattle feeders. The cattle fattened in the feeding pens are moved from one section of the feeding pens to another section thereof until they reach the retaining pens and are then ready for the killing floor in the plant. At the time of the hearing the Respondent had approximately 10,000 head of cattle in the plant pens. The major portion of such fattened stock is slaughtered and processed in Respondent's adjacent packing plant while a substantial portion is shipped to market on the hoof. There is one general man-

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regard to hire or tenure of employment or any term or condition of employment;

(b) Dominating or interfering with the administration of Tovrea Employees' Association, or dominating or interfering with the formation or administration of any other labor organization of its employees, or contributing support thereto;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection as guaranteed in Section 7 of the Act;

(d) Giving effect to its contract with Tovrea Employees' Association.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Withdraw all recognition from Tovrea Employees' Association as a representative of any of its employees for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work,

ager over the affairs of this packing plant and the mill and feeding pens. Respondent is not only in the business just described but operates four cattle feeding ranches. The ranch known as Topaco No. 2 was taken at the hearing before the Board as typical and its manager testified that it "consists of 640 acres divided up into various fields, and in the southeast corner it contains three feed lots sections comprising about 35 acres in all * * *. We raise general agricultural crops such as hay, alfalfa hay, grain hay, higera, and sometimes sedan grass for hay and pasture * * *." A large portion of the cattle food consumed on each one of the ranches is grown thereon or in its vicinity. While some stock is moved from ranch to packing plant, most of the stock fattened on the ranches is not marketed in any way through the packing plant and most of the stock fattened in the feeding pens adjacent to the packing plant comes to it from sources other than the ranches to which reference has been made. As stated in Respondent's brief, "There are no transfers of employees between the feed

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and completely disestablish said Association as such representative;

(b) Offer to [naming nine individuals] immediate and full reinstatement * * *.

(c) Make whole the employees named in 2(b) above for any loss of pay they will have suffered by reason of the termination of their employment by payment to each of them respectively, of a sum of money equal to that which each would normally have earned as wages from the date of such termination to the date of the offer of reinstatement or placement on the preferential list as ordered in paragraph (b) above, less his net earnings during said period; deducting, however, from the amount otherwise due to each of the said employees monies received by said employee during said period for work performed upon Federal, State, county, municipal, or other work-relief projects; and pay over the amount, so deducted, to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects;

(d) Post immediately in conspicuous places throughout its plants and other places of employment, and maintain for a period of at least sixty (60) consecutive days, notices that the respondent will cease and desist in the manner aforesaid * * *."

lots and the plant and there are no duties common to employees in the two operations."

The nine employees whose reinstatement has been ordered were working in the mill and feeding pens at the time of their discharge, and Respondent claims that their work was agricultural in character and that according to the terms of the Act [Sec. 2 (3)] the Board's order could not properly apply to them. The viewpoint of Respondent is, that the adjacent mill and feeding pens are operated separately and practically independently of the packing plant, and that the work performed is practically the same as that done on Respondent's stock feeding ranches, which of course is agricultural work. That, so runs the argument, since the status of the employee "depends entirely on the nature of the work which he is employed to perform," it follows that the mill and feeding pen employees occupy the status of agricultural employees.

The difficulty with Respondent's position is: (a) The feed mill and feeding pens adjacent to the packing plant are maintained as an incident to and not independent of the operation of the packing plant; (b) The nature of the work alone does not determine the status of workers under the provisions of the Act. We are not called upon to determine the status of the employees on the ranches but we do not hesitate to say that while the grinding of the feed and the actual feeding on the ranches may be quite similar to such work done adjacent to the packing plant, divergent circumstances may well throw the employees of the ranches without and those of the packing plant within the terms of the Act.

Labor on a cattle ranch is as agricultural in nature as labor on a wheat growing farm [3 *Corpus Juris Secundum*, Agriculture, Sec. 1, pp. 365-366]. But here we do not have stock raising or feeding as an incident to a stock ranch, nor do we have stock feeding or conditioning as a separate activity, but we do have stock ready for conditioning and fattening confined in relatively small corrals and fed in-

tensively for short spaces of time as an incident to a meat slaughtering and packing industrial enterprise. The elements of agricultural labor as distinguished from non-agricultural labor seems entirely lacking. See *North Whittier Heights Citrus Assn. v. National Labor Relations Board,* — Fed. (2d) — [5 L. R. R. 596], (C. C. A. 9, Jan. 12, 1940), and cited authority. We see no effective relation between the packing plant with its adjacent mill and pens and Respondent's ranches. We hold that none of the laborers therein are agricultural laborers and that all are within the purview of the Act.

The Board finds that nine of such employees had been discriminatorily discharged because of their membership in and activity in the interests of a union and that Respondent has engaged in unfair labor practices as defined by Sec. 8 (1), (2) and (3) and Sec. 2 (6) and (7) of the Act.

Briefly the supporting evidence is as follows:

Relevant events date back to October, 1937, when strong hints of dissatisfaction among the feeding pen and mill employees reached the foreman, Walter Le Barron. Le Barron sought information from an employee, B. B. Henry, and learned that the men wanted a raise in wages. B. B. Henry at Le Barron's suggestion arranged for a committee of three employees, Le Barron, B. B. Henry, and Cline, to confer with the plant's general manager, who was also president. For some reason the conference was never held. B. B. Henry testified that shortly after the appointment of the committee he got from Cline that Le Barron thought it would be all right to ask for a little more money for those who handled the teams and the cattle. B. B. Henry according to his testimony disapproved of this to Cline and instead suggested a raise of ten cents an hour for all the employees in the feed lots. The next day Cline told B. B. Henry that he was quitting the committee; that there was "a report up in the office that we were going to have a strike down there, and if we went up we would all get canned." Shortly afterward Le Barron laid B. B. Henry

off because he had "to many slick managers"—he was not giving the cattle enough feed. When B. B. Henry denied the charge Le Barron said, "I'm on the spot. I can't talk." A week or so later the hiring foreman told B. B. Henry that a lot of men lost their jobs because of union activity. B. B. Henry had been in the Respondent's employ for over a year and there was no evidence of any former complaints against him. It cannot be said that this evidence is not substantial in support of the Board's conclusion that B. B. Henry's discharge was discriminatory because of his membership on a committee of employees whose purpose was to induce the payment of higher wages.

An organized Union of some of the employees held its first meeting November 26, 1937, which was followed by another three days later, at which Woodrow Wilson and Wilford Henry were elected president and vice-president respectively. Wilson was discharged the same day and Wilford Henry the next.

Le Barron accused Wilson of improperly mixing the feed and allowing the trucks to obstruct the cattle pass way, but there is testimony that he told Wilson that if he would go home and say nothing about the Union or go to any of their meetings he would be back on the job in a few days. When Wilford Henry was discharged he was accused of leaving the feed gate open permitting the cattle to get out, but this he denied. There is evidence that Le Barron had warned Wilford Henry about talking unionism, and that he had told Wilford Henry that he was a pretty good feeder but if the union talk got to the office he would have to lay him off. We hold that the Board's conclusion that these two men's discharge was discriminatory is supported by the evidence.

Six additional discharges or lay offs occurred within a few days thereafter—all members of the union, and there is ample evidence to support the Board's conclusions that these men were discharged or laid off discriminatorily because of their union activity. There is also evidence to the

effect that the discharges or lay offs were because of an economy movement. But the Act itself provides that we are not the triers of fact and that we have no authority to weigh the testimony and revise the Board's factual conclusions which are supported by substantial evidence.

Prior to the union activity hereinbefore narrated an organization of the Respondent's employees, known as the Tovrea Employees' Association, had existed for some time, and the evidence shows it to have functioned along social lines. Soon after the organization of the union heretofore referred to, which was a local affiliated with the American Federation of Labor, the Association became very active. Its membership grew rapidly and it changed its character to that of a union of employees. The president of the old organization resigned because as foreman of Respondent's shipping department he acted in a supervisory capacity and was therefore not eligible to retain membership. Respondent's vice-president and general manager advised a committee that the organization could no longer meet on Respondent's property. In shortly less than three weeks after this transformation, Respondent and the Association entered into an agreement for collective bargaining with a provision that either party could be relieved therefrom after a ten days' notice. There is evidence to the effect that the resigned president of the Association suggested the name of his successor; that a foreman suggested the name of one to go on a committee; that the committee met in Superintendent Belnap's office; that Mr. Laurent, assistant auditor of Respondent, was practically the leader in the reorganized Association; that at the meeting in Mr. Belnap's office Mr. Tovrea stated that the company would bargain with the Association; that Mr. Bainbridge stated to the witness Morgan that they would get Tovrea's Association together and get their membership strong enough so that they could keep out all outside organizations. There is other evidence calculated to show that the Respondent sought to discourage and defeat the formation of the union

by encouraging what was unquestionably a company organization of employees.

We hold that there is substantial evidence to support the Board's conclusions that Respondent dominates the Association and thereby and through other acts has interfered with the formation and administration of another labor organization of the employees, and that its order in relation to such Association must in all respects be enforced. The evidence is also amply sufficient to support the Board's conclusions that the Respondent did interfere in the employees' right of self organization et cetera and we think it would not be useful to repeat or call special attention to such evidence.

The order for reinstatement with back pay included the provision that there should be deducted from such pay "his net earnings during said period; deducting, however, from the amount otherwise due to each of the said employees, monies received by said employee during said period for work performed upon Federal, State, county, municipal or other work-relief projects; and pay over the amount so deducted, to the appropriate fiscal agency of" the governmental agency "which supplied the funds for said work-relief projects." The Board has in several cases made the requirement that the sum deducted on account of relief-work payments should be returned to the source of such payments by the company required to make the back pay. So far as we have been able to ascertain, no court has passed upon the legality of such an order after the point has been argued, with the possible exception of the Third Circuit Court of Appeals, in *Republic Steel Corp. v. National Labor Relations Board,* 107 Fed. (2d) 472, 478 [5 L. R. R. 266] (C. C. A. 3, 1939). In that case a like order was held to be within the discretionary power of the Board and not unreasonable. The Second Circuit in *National Labor Relations Board v. National Casket Co.,* 107 Fed. (2d) 992 [5 L. R. R. 437], called attention to the in-

clusion of this requirement in the Board's order, and remarked, "The validity of this provision has not been argued and we express no opinion on the point." Judge L. Hand filed a dissenting opinion as to other subjects but on the one under discussion specifically agreed with the court's expression as above quoted.

The Act provides for "reinstatement of employees with or without back pay, as will effectuate the purpose of the Act." For a proper understanding this statement must be read and considered as a whole. To our minds the discretion conferred upon the Board is limited to the point of whether an order for back pay will do more toward effectuating the purposes of the Act than to omit it—or possibly than an order for payment of part thereof. Whether or not this provision is held to be punitive in nature, we see no warrant for doing other than it provides. Certainly it does not authorize the Board to go outside of the statute and prescribe its own coercive measures in aid of "effectuating" the purposes of the Act. *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197 [3 L. R. R. Man. 645]; *National Labor Relations Board v. Remington Rand,* 94 Fed. (2d) 862, 872 [1-A L. R. R. Man. 585, 594].

We have discussed each objection to the enforcement of the Board's order without lengthy quotation and discussion of fact and without citation of numerous authorities. It seems to us that the time has come when the fundamentals underlying the Wagner Act need not be the subject of treatises in every opinion upon the petition of the National Labor Relations Board for enforcement of its orders.

Let the order of the Board be enforced, excepting, however, that portion thereof in regard to payment to the Government agencies of amounts deducted from back awards by reason of monies received by the employees for work performed upon work-relief projects.

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